court.[19] The contention that alienable interests might be too remote was urged upon Judge Finch in *Sawyer* v. *Cubby*,[20] but he denied its validity and stated in unmistakable terms that a suspension of absolute ownership could occur in New York "only when there are no persons in being by whom an absolute estate in possession can be conveyed." If it be conceded that the cases in New York were in conflict, it is submitted that the court could be justified in reaching the result of the principal case only after a thorough examination of the authorities and a frank repudiation of the test of a perpetuity laid down by Judge Finch.

The consequences of the judicial adoption of the rule against remoteness in New York must be far reaching. Its application to limitations of real property cannot be doubted.[21] If, therefore, a contingent fee to a person in being and his heirs is limited upon a fee, the contingency must be certain to occur, if ever, within two lives in being or the limitation will be void. How far will the court go in applying the so-called common law rule against remoteness? There are a number of future interests, condemned for remoteness in the English cases,[22] which have never been challenged in New York because they were always alienable. The Court of Appeals has unfortunately introduced a new element of confusion into a field of law whose uncertainty had already caused excessive litigation.

RATE MAKING—A JUDICIAL, LEGISLATIVE, OR MINISTERIAL FUNCTION?—While recognizing the essential separation of the departments of government[1] and the fundamental distinction between legislative and judicial acts,[2] the courts are not agreed on the criterion that is to determine into which category rate making by commission is to be placed. Obviously the mere legislative designation of the commission as a court is without weight.[3] Similarly, the character of the commission and the form of its procedure, though suggested as tests,[4] are not conclusive for the performance by the regular courts of non-judicial acts does not make the acts judicial.[5] Neither is a judicial act any the less so because performed by a non-judicial body,[6] nor the action of such a body made judicial by the employment of court methods.[7] But even were the character of the commission or of its procedure determinative, they would scarcely stamp as judicial the usual commission hearing to which the parties need not be noticed to appear, which is not governed by the ordinary rules of evidence, and terminates in an order not

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[19]Sawyer *v.* Cubby, *supra*; Beardsley *v.* Hotchkiss (1884) 96 N. Y. 201.

[20]*Supra.*

[21]See the now significant dictum of Cullen, J., in Henderson *v.* Henderson (1887) 46 Hun, 509, 514; Gott *v.* Cook (1833) 7 Paige 521, 543.

[22]London & S. W. Ry. Co. *v.* Gomm, *supra.*

[1]Federalist, Nos. 46, 47; Kilbourn *v.* Thompson (1880) 103 U. S. 168; Matter of Davies (1901) 168 N. Y. 89, 101.

[2]Merrill *v.* Sherburne (1818) 1 N. H. 199; Bates *v.* Kimball (Vt. 1824) 2 Chip. 77; Sinking Fund Cases (1878) 99 U. S. 700, 761; People *v.* Brd. of Ed. (1880) 54 Cal. 375.

[3]So. Ry. Co. *v.* Greensboro, etc. Co. (1904) 134 Fed. 82, 94.

[4]Prentis *v.* Atl. etc. Co. (1909) 211 U. S. 210, opinions of Fuller, C. J., and Harlan, J.

[5]U. S. *v.* Ferreira (1851) 13 How. 40; Matter of Saline County (1869) 45 Mo. 52; Robey *v.* The County (1900) 92 Md. 150.

[6]Calder *v.* Bull (1798) 3 Dall. 386; Comrs. *v.* Griffin (1890) 134 Ill. 330, 341; Robinson *v.* Supervisors (1860) 16 Cal. 208.

[7]Gordon *v.* U. S. (1864) 117 U. S. 697.

necessarily based upon a record, and usually enforced by a pecuniary penalty.[8] The only sound test, then, is the nature of the act itself.[9] If it be the prescription of a new rule for the future, it is legislative. If it be the construction and application of existing law to the settlement of a controversy, it is judicial.[2] The fact that courts do, at times, lay down a rule of future conduct as incidental to the determination and enforcement of existing rights and liabilities constitutes no impairment of this test. Broadly a judicial decision always does this; equity, as in decreeing specific performance, would seem often to do so in a very real sense. But on principle the acts are separated *toto caelo*, for a decision, though directing future conduct, does not, like a statute, establish a new obligation, but merely enforces an existing one.

The direct exercise of the rate-making power in the enactment of a rate statute being clearly legislative,[10] it is not apparent how its vicarious exercise by a commission makes it judicial. Yet the New York Court of Appeals, repudiating the doctrine of the Supreme Court that the action of the commission is legislative,[11] has recently held it to be so far judicial as to be properly reviewable by *certiorari*. *People etc.* v. *Willcox* (1909) N. Y. L. J. Mar. 4, 1909. The term "judicial" is applied loosely to three classes of acts: Those of ministerial officers involving discretion;[12] the proceedings of a regular court; and acts, by whomsoever performed, amounting to the determination of a controversy, involving rights or property.[6] The New York court cannot intend the first meaning for acts of this class are not reviewable by *certiorari*.[13] The second meaning was scarcely contemplated, for even though the New York constitution, unlike that of the United States, does not vest all judicial power in the regular courts and effect a strict separation of governmental powers,[14] yet it comes far short of the Virginia constitution under which the concurring judges in the *Prentis* case felt justified in considering the commission a court.[15] There is still a separation of powers in New York. Where statutes imposing ministerial duties on the courts have been sustained, it has been on the ground that the duties were merely incidental to the performance of an essentially judicial act,[16] while the legislative performance of what are now regarded as judicial acts is to be explained on historical grounds.[17] In view of the procedure already indicated, it is hardly possible to regard the ordinary commission as a court. To do so would entail the unfortunate consequences of barring the delegation to it of the many purely ministerial duties that constitute the

[8]See Chicago, etc. Ry. Co. *v.* Minn. (1889) 134 U. S. 418, 460; So. Pac. Co. *v.* R. R. Com'rs. (1896) 78 Fed. 236, 259. See also N. Y. Pub. Ser. Com. Law §§ 20, 49, 50, 51, 57.

[9]*Ex parte* Va. (1879) 100 U. S. 339, 348; Holmes, J., in Prentis *v.* Atl. Co., *supra*.

[10]See Freund, Pol. Power §§ 374, 375; People *v.* Budd (1889) 117 N. Y. 1; aff'd. (1892) 143 U. S. 517; Munn *v.* Illinois (1876) 94 U. S. 113.

[11]Prentis *v.* Atl. etc. Co. *supra*.

[12]Mills *et al.* *v.* Brooklyn (1865) 32 N. Y. 489.

[13]People etc. *v.* Bd. of Suprs. (1892) 131 N. Y. 468; People *v.* McWilliams (1906) 185 N. Y. 92.

[14]See People *v.* R. R. Com'rs. (N. Y. 1898) 32 App. Div. 179; Vil. of Sar. Spgs. *v.* Sar. Gas. Co. (1908) 191 N. Y. 123.

[15]See also N. & P. R. R. Co. *v.* Com'th. (1904) 103 Va. 289; W. & S. R. R. *v.* Com'th. (1906) 106 Va. 264.

[16]See 7 COLUMBIA LAW REVIEW 603; Matter of Davies, *supra*; Citizens' Bank *v.* Greenburgh (1903) 173 N. Y. 215.

[17]See Maynard *v.* Hill (1888) 125 U. S. 190.

bulk of its business,[18] and make impossible the enjoining of its orders by the Federal courts.[19] Conceding the limits of the third class to be broad and ill-defined, it is not clear how a commission rate order is to be brought within its purview, since the commission's action is in no accurate sense the settlement of a controversy under existing law. It is rather an investigation of the facts, as a legislative inquiry, with a view to the promulgation of a new rule for the future,—the order, when issued, taking its character and effect from the legislature.[20] While the New York case turns in part upon a construction of the statute,[21] it relies mainly on decisions rendered under the old Gas and Railroad Commission Statutes. The few of these that are rate cases, it is submitted, are distinguishable in that under these statutes there was no provision for rehearing, the commission's orders were appealable directly to the Appellate Division—thus assuming a judicial record[22]—and until such appeal was perfected the order was not enforcible.[23] The present statute, on the other hand, in allowing rehearings,[24] negatives the idea of a determination of a controversy. It does not provide for an appeal from the order, but merely for collateral attack, and the order is, like a statute, self-enforcing.[25]

The rate-making power, then, is properly to be regarded as legislative.[26] Whether a commission in fixing rates is performing a delegated legislative function or an administrative one is an open question. Whatever may be said in support of the former alternative,[27] the latter is conceived to be preferable as the spirit of our constitutions and theory of government, as well as the great weight of authority, are clearly opposed to the delegation of purely legislative powers.[28] This difficulty disappears by regarding the commission as vested not with the legislative prerogative, but merely with the administrative duty of examining the facts to ascertain what the reasonable rate is, which the legislature, and not the commission, has determined shall be established.[29]

CONTRACTS WITH MONOPOLIES AND *Par Delictum*.—While admitting the unenforcibility of contracts in themselves in restraint of trade or tending toward monopoly, the courts have been reluctant to refuse performance of contracts only remotely connected with the illegal purpose. Leases of property made to a corporation known to be unlawful are upheld.[1] And, though the refusal to enforce the contracts of an unlawful combination to sell the

[18]See Norwalk St. Ry. Co.'s Appeal (1897) 69 Conn. 576.

[19]Under U. S. Comp. Stat. § 720.

[20]Mayor *et al. v.* Knoxville Water Co. (1909) 29 Sup. Ct. Rep. 148.

[21]See opinion below, (1908) 113 N. Y. Sup. 861.

[22]See Vil. of Saratoga Spgs. *v.* Saratoga Gas Co., *supra*, at p. 148.

[23]R. R. Law §§ 59, 161, 162.

[24]Pub. Ser. Com. Law § 22.

[25]Pub. Ser. Com. Law §§ 59, 56.

[26]Telegraph Co. *v.* Myatt (1899) 98 Fed. 335; Reagan *v.* Loan & Trust Co. (1893) 154 U. S. 362; Steenerson *v.* Gt. No. Ry. Co. (1897) 69 Minn. 353; Neb. Tel. Co. *v.* State (1898) 55 Neb. 627; see Note 10, *supra*.

[27]See 7 COLUMBIA LAW REVIEW 61; 8 *Idem* 317; 21 Harv. L. Rev. 205.

[28]Cooley, Const. Limits. (7th Ed.) 163; O'Neil *v.* Ins. Co. (1895) 166 Pa. St. 72; see Field *v.* Clark (1891) 143 U. S. 649; *In re* Kollock (1897) 165 U. S. 526.

[29]See Express Co. *v.* R. R. (1892) 111 N. C. 463; Ga. R. R. *v.* Smith *et al.* (1883) 70 Ga. 694; State *v.* Briggs (1904) 45 Ore. 366; *In re* Thompson (1904) 36 Wash. 377.

[1]7 COLUMBIA LAW REVIEW 618.